

INFORMATION PAPER

DAJA-AL
6 September 2005

SUBJECT: Military Whistleblower Protection Act

1. Purpose. To provide information about the Military Whistleblower Protection Act.

2. Facts.

a. The Military Whistleblower Protection Act (MWPA) is codified at 10 U.S.C. § 1034. UP the MWPA, no person may restrict a member of the armed forces from making a lawful communication to a Member of Congress or an Inspector General (IG). Furthermore, no person may take or threaten to take an unfavorable personnel action, or withhold or threaten to withhold a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing a protected communication.

b. The MWPA establishes two types of protected communications:

(1) all lawful communications to a Member of Congress or an IG; and

(2) all communications to a Member of Congress; IG; a member of a DoD audit, inspection, investigation, or law enforcement organization; any person or organization in the chain of command;¹ or other designated person or organization, reporting what the member reasonably believes constitutes evidence of any of the following: a violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination; a gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

c. The MWPA does not define "personnel action." DODD 7050.6,² however, broadly defines a "personnel action" as any action taken on a member of the Armed Forces that affects or has the potential to affect that military member's current position or career. Such actions include a promotion; a disciplinary or other corrective action; a transfer or reassignment; a performance evaluation; a decision on pay, benefits, awards, or training; referral for mental health evaluation UP DODD 6490.1³; and any other significant change in duties or responsibilities inconsistent with the military member's rank. Moreover, DODD 7050.6 defines reprisal as "taking or threatening to take an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, for making or preparing a protected communication."

¹ Public Law 108-375, 28 Oct 04, now specifies "any person or organization in the chain of command" as a recipient of a protected communication. Prior to that date, "any person or organization in the chain of command" was listed as an example of an "other designated person or organization."

² Military Whistleblower Protection (23 June 2000).

³ Mental Health Evaluations of Members of the Armed Forces (1 October 1997) (*see also* AR 600-20, Army Command Policy, (13 May 2002), paragraph 5-4b).

d. Reporting Procedure. DODD 7050.6, paragraph 5.1., directs that the Department of Defense (DoD) IG shall investigate or oversee DoD Component IG investigations of the MWPA. AR 20-1 directs that Soldiers threatened with unfavorable personnel action, or who receive unfavorable action as an act of reprisal or retaliation as a result of making a protected communication should report these circumstances to the DOD IG.⁴ If an allegation of reprisal is made known to any agency authorized to receive complaints, (listed in AR 20-1, Appendix E-1) the agency should refer the complaint to the DoDIG. It is strongly encouraged to simultaneously report such threats or acts of reprisal to the appropriate chain of command.

e. Analyzing MWPA violations. In analyzing whether a violation of the MWPA occurred, IGDG 7050.6,⁵ Chapter 2, directs the IG to focus on the following four questions:

(1) Did the military member make or prepare a protected communication?

(2) Was an unfavorable personnel action taken or threatened, or was a favorable action withheld or was there a threat to withhold such action following the protected communication?

(3) Did the official(s) responsible for taking, withholding, or threatening the personnel action know about the protected communication?

(4) Does the evidence establish that the personnel action would have been taken, withheld, or threatened if the protected communication had not been made?⁶

f. Investigation Procedures.

(1) IGs are required to consider allegations of MWPA violations that the military member reports to them within 60 days after the date the military member becomes aware of the personnel action that is the subject of the allegation.⁷ When such allegations are received, the IG is required to expeditiously determine whether there is sufficient evidence to warrant an investigation of the allegation.⁸ Determinations by the IG of a military department that there is insufficient evidence to warrant an investigation must be forwarded to the DOD IG for review.

⁴ AR 20-1, Army Command Policy, 13 May 2002, paragraph 5-12*d*.

⁵ Guide to Investigating Reprisal and Improper Referrals for Mental Health Evaluations (6 February 1996).

⁶ Although not required by the plain language of 10 U.S.C. § 1034 or DODD 7050.6, the framework used to analyze alleged violations of the MWPA results in the burden being shifted to the official to show that he or she would have taken or withheld the personnel action in question even if the complainant had not made or prepared the protected communication — once the complainant establishes that he or she made or prepared a protected communication and thereafter suffered a personnel action.

⁷ Within 10 working days the Military Department IGs are required to provide a copy of the written complaint or detailed summary of the allegation to the DOD IG.

⁸ AR 20-1, Inspector General Activities and Procedures, (29 March 2002), paragraph 8-9*c*., provides guidance in conducting MWPA investigations. Paragraph 8.3*i*. provides that only the Secretary of the Army, the Under Secretary of the Army, the Chief of Staff, the Vice Chief of Staff, or TIG may investigate or inquire into allegations of impropriety against general officers, brigadier general selectees, members of the Senior Executive Service, and other Army civilian employees of comparable rank or position. Informal or preliminary inquiries into such senior officials may not be conducted, not even to determine the validity of the allegation. All such allegations must be reported to the DAIG.

(2) Upon a determination that an investigation is warranted, the IG making that determination is required to expeditiously investigate the allegation.⁹ In the case of a determination made by the DOD IG, the DOD IG may delegate responsibility for conducting the investigation to the IG of a military department.

(3) If the IG of a military department conducts the investigation, the DOD IG is still the approval authority.

g. Board for Correction of Military Records (BCMR) Review. Each military service's BCMR has jurisdiction to review allegations of a violation of the MWPA and determine appropriate remedies. In resolving an application submitted alleging a violation of the MWPA, the BCMR shall review the report of the IG and may request further investigation. When the BCMR fails to issue a final decision within 180 days regarding an application alleging violations of the MWPA, the applicant is deemed to have exhausted his or her administrative remedies UP 10 U.S.C. § 1552.

h. Sanctions for violators of MWPA.

(1) Military violators of this Act are subject to prosecution under Article 92, UCMJ. [See DOD Directive 7050.6, paragraph 4.5. and AR 20-1, para. 1-11.]

(2) Violators of this act are prohibited from receiving payment of salary UP the Consolidated Appropriations Act of 2005.¹⁰ Section 618 of the Consolidated Appropriations Act of 2005 states that appropriated funds shall not be available for the payment of the salary of any officer or employee of the Federal Government, who prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from communicating with Congress. The Government Accountability Office recently held that the Consolidated Appropriations Act of 2004, which contains language identical to the 2005 version, barred the use of appropriated funds to pay the salary of an official who prohibited another federal employee from communicating with Congress.¹¹ GAO recommended that the Federal agency treat the official's salary as an improper payment beginning with the date when the official initially prohibited the Federal employee from communicating with Congress.

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⁹ When the Military Department IG determines a report of investigation cannot be submitted within 180 days after receipt of the reprisal allegation, such information must be reported to the Secretary of Defense, the member making the allegation, and the DOD IG.

¹⁰ Pub. L. No. 108-447, Div H, tit. VI, § 618, 118 Stat. 2809, 3277 (December 8, 2004).

¹¹ Department of Health and Human Services--Chief Actuary's Communications with Congress, B-302911, 2004 U.S. Comp. Gen. LEXIS 183, September 7, 2004.